Supreme Court, U.S.
FILED
JUN 13 1980

# APPENDIX

IN THE

# Supreme Court of the United States

October Term, 1979

## No. 79-1171

STATE OF MINNESOTA,

*Petitioner,*

vs.

CLOVER LEAF CREAMERY COMPANY, PHILLIPS PETROLEUM COMPANY, MARIGOLD FOODS, INC., UNILOY DIVISION OF HOOVER UNIVERSAL, INC. WEBER & BARLOW STORES, INC., THE SOCIETY OF THE PLASTICS INDUSTRY, INC., WELLS DAIRY, INC., AND M-H PACKAGING SYSTEMS, INC.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

PETITION FOR CERTIORARI FILED JANUARY 29, 1980
CERTIORARI GRANTED MARCH 31, 1980

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# APPENDIX

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## CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

## STATE OF MINNESOTA, COUNTY OF RAMSEY, SECOND JUDICIAL DISTRICT

File No. 423258

Oct. 27, 1977 — Affidavit of service, Notice and Motion to Dismiss filed.

Nov. 22, 1977 — Defendant's memorandum in support of motion to dismiss filed, service admitted.

Nov. 23, 1977 — Affidavit of service, summons and complaint filed.

Dec. 6, 1977 — Defendant's supplemental memorandum filed.

Dec. 22, 1977 — Order and memorandum denying defendant's motion to dismiss filed. Abramson, J.

Jan. 5, 1978 — Defendant's answer and affidavit of service filed.

Jan. 6, 1978 — Court note of issue and affidavit of service filed.

Mar. 15, 1978 — Trial by the court commenced.

Mar. 21, 1978 — Case taken under advisement, Marsden, J.

April 6, 1978 — Findings, conclusions and order of Marsden, J. and notice of entry of findings filed.

April 7, 1978 — Judgment roll made and filed. Judgment entered and served.

April 12, 1978 — Affidavit of service, notice of appeal filed. Return to Supreme Court.

STATE OF MINNESOTA, SUPREME COURT

File No. 48827

April 11, 1978 — Date of service of notice of appeal.

May 4, 1978 — Letter of Otis, J. filed. No preconference. Time for transcript and briefs shall run from 5-2-78.

Aug. 11, 1978 — Certificate of delivery of transcript on 8-7-78 filed.

Sept. 12, 1978 — Order filed permitting Minnesota Public Interest Research Group to file Amicus Curiae brief.

Oct. 10, 1978 — Appellant's (State of Minnesota) Briefs and appendices filed with service.

Oct. 12, 1978 — Briefs of Amicus Curiae (Minnesota Public Interest Research Group) filed with service.

Nov. 20, 1978 — Respondents' Briefs filed with service.

Dec. 8, 1978 — Appellant's reply briefs filed with service.

Mar. 5, 1979 — Hearing En Banc — Calendar No. 111.

Sept. 7, 1979 — Opinion and syllabus filed. Affirmed. Peterson, J. Dissenting, Wahl, J.

Sept. 19, 1979 — Motion, recommendations and order filed extending time to serve and file petition for rehearing to Oct. 5, 1979.

Oct. 5, 1979 — Petition for rehearing filed with service.

Oct. 31, 1979 — Petition for rehearing denied; judgment of affirmance entered; Judgment roll made and filed; remittitur to clerk below; original files and exhibits returned to clerk below.

STATE OF MINNESOTA
County of Ramsey

DISTRICT COURT
Second Judicial District

CLOVER LEAF CREAMERY COMPANY,
PHILLIPS PETROLEUM COMPANY,
MARIGOLD FOODS, INC.,
UNILOY DIVISION OF
HOOVER BALL AND BEARING COMPANY,
WEBER & BARLOW STORES, INC.,
THE SOCIETY OF THE PLASTICS INDUSTRY, INC.,
DENNIS JOHNSON, d/b/a JOHNSON STAR MARKET,
WELLS DAIRY, INC., AND
M-H PACKAGING SYSTEMS, INC.

Plaintiffs,

vs.

STATE OF MINNESOTA,

Defendant.

## COMPLAINT

Plaintiffs, for their Complaint against the defendant, allege as follows:

### INTRODUCTION

1. This is an action for declaratory and injunctive relief whereby plaintiffs seek to have the Court declare invalid and enjoin enforcement of Laws of Minnesota 1977, Chapter 268. Said statute purports to ban the retail sale of milk and fluid milk products in nonreturnable, nonrefillable plastic milk containers in the State of Minnesota. Laws of Minnesota 1977, Chapter 455, Section 96 provides that Chapter 268 is effective July 1, 1978.

## PARTIES

2. Plaintiff Clover Leaf Creamery Company (Clover Leaf) is a corporation organized and existing under the laws of the State of Minnesota. It is engaged, *inter alia*, in the packaging and distribution of milk and milk products in the State of Minnesota and in interstate commerce. Its principal place of business is Minneapolis, Minnesota.

3. Plaintiff Phillips Petroleum Company (Phillips) is a corporation organized and existing under the laws of the State of Delaware. It is engaged, *inter alia*, in the business of manufacturing and distributing resin used in the production of plastic milk containers. It distributes such resin in Minnesota and in interstate commerce. Its principal place of business is Bartlesville, Oklahoma.

4. Plaintiff Marigold Foods, Inc. (Marigold) is a corporation organized and existing under the laws of the State of Minnesota. It is engaged, *inter alia*, in the packaging and distribution of milk and milk products in the State of Minnesota and in interstate commerce. Its principal place of business is Minneapolis, Minnesota.

5. Plaintiff Uniloy is a division of Hoover Ball and Bearing Company, a corporation organized and existing under the laws of the State of Michigan. It is engaged, *inter alia*, in the business of manufacturing and distributing machinery for the production of plastic milk containers in Minnesota and in interstate commerce. Its principal place of business is Saline, Michigan.

6. Plaintiff Weber & Barlow Stores, Inc. (Barlow) is a corporation organized and existing under the laws of Minnesota. It is engaged in the retail sale of milk and milk products in Rochester, Minnesota, Minot, North Dakota and Cedar Rapids, Iowa. Its principal place of businss is Rochester, Minnesota.

7. Plaintiff The Society of the Plastics Industry, Inc. (SPI) is a nonprofit corporation organized and existing under the laws of the State of New York. It is the principal trade association for the plastics industry in the United States. It represents approximately 1200 members, which account for 95% of the plastics materials and machinery produced and about 75% of the plastics processing volume in the United States. Most of its members are engaged in interstate commerce. Necessarily included in the plastics market is the State of Minnesota, and SPI's members include plaintiffs Phillips, Uniloy, and Packaging Systems. SPI's main offices are in New York City.

8. Plaintiff Dennis Johnson (Johnson) is a resident of the State of Minnesota and is engaged in the retail sale of milk and milk products. He does business under the name Johnson Star Market, and his principal place of business is Anoka, Minnesota.

9. Plaintiff Wells Dairy, Inc. (Wells) is a corporation organized and existing under the laws of the State of Iowa. It is engaged, *inter alia*, in the packaging and distribution of milk and milk products in the State of Minnesota and in interstate commerce. Its principal place of business is Le Mars, Iowa.

10. Plaintiff M-H Packaging Systems, Inc. (Packaging Systems) is a corporation organized and existing under the laws of the State of Minnesota. It is engaged, *inter alia*, in the business of manufacturing and distributing plastic milk containers in Minnesota and in interstate commerce. Its principal place of business is Little Canada, Minnesota.

COUNT ONE

11. Each plaintiff and numerous members of plaintiff SPI presently are directly or indirectly engaged in, and have

a direct economic interest in, the manufacture, distribution, use and sale of plastic milk containers within the State of Minnesota and between Minnesota and other states.

12. The plaintiffs and numerous members of plaintiff SPI have substantial amounts of money, plant, equipment and personnel involved in the manufacture, distribution, use and sale of plastic milk containers within the State of Minnesota and between Minnesota and other states. Their activity results in substantial quantities of raw materials, equipment, finished products and milk being transported in interstate commerce.

13. Plaintiffs Clover Leaf, Marigold and Wells presently package and distribute milk in plastic containers in Minnesota and adjoining states. Each has invested a substantial amount of money in equipment and improvements in order to market milk in such containers, and a substantial portion of the revenues of each is derived from the sale of milk in such containers.

14. Plaintiffs Barlow and Johnson presently sell at retail milk which is packaged in plastic containers and derive revenues from such sales.

15. Plaintiff Phillips has derived and will continue to derive substantial revenues from the sale of resin for the manufacture of plastic milk containers to customers in Minnesota and other states.

16. Plaintiff Uniloy has derived and will continue to derive substantial revenues from the sale of machinery for the blow-molding of plastic milk containers to customers in Minnesota and other states.

17. Plaintiff Packaging Systems has a manufacturing facility in Little Canada, Minnesota, where it manufactures plastic milk containers. It has derived and will continue to de-

rive substantial revenues from the sale of such containers to customers in Minnesota and other states.

18. In 1977 the Minnesota Legislature enacted Laws of Minnesota 1977, Chapter 268, which provides as follows:

> "Section 1. [116F.21] [Milk Packaging, Statement of Policy.] The legislature finds that the use of nonreturnable nonrefillable containers for the packaging of milk and other milk products presents a solid waste management problem for the state, promotes energy waste and depletes natural resources. The legislature therefore, in furtherance of the policies stated in Minnesota Statutes, Section 116F.01, determines that the use of nonreturnable, nonrefillable containers for the packaging milk and other milk products should be discouraged and that the use of returnable and reusable packaging for these products is preferred and should be encouraged.
>
> Section 2. [116F.22] [Prohibitions.] Subdivision 1. No person shall sell at retail or offer for sale at retail in this state any milk or fluid milk product as defined in Minnesota Statutes, Section 32.291, other than sour cream, cottage cheese, and yogurt, in a nonreturnable, nonrefillable rigid or semi-rigid container at least 50 per cent of which is plastic.
>
> Subd. 2. A violation of subdivision 1 is a misdemeanor and each day of violation is a separate offense.
>
> Sec. 3. This act is effective July 1, 1977."

19. In 1977 the Minnesota Legislature also enacted Laws of Minnesota 1977, Chapter 455, Section 96 of which provides as follows:

> "Sec. 96. [Plastic Milk Bottles.] Notwithstanding any law to the contrary, no prohibition on the retail sale or the offer for retail sale of milk in nonreturnable, non-

refillable plastic containers shall be effective prior to July 1, 1978. This section is effective the day following final enactment."

20. In directing its effective proscription solely to non-returnable, nonrefillable, rigid or semi-rigid plastic milk containers, said Chapter 268 discriminates invidiously and without rational basis between said containers and other types of containers and is therefore violative of plaintiffs' entitlement to equal protection of the laws guaranteed by Amendment XIV to the United States Constitution.

COUNT TWO

21. Reallege paragraphs 1 through 19.

22. Said Chapter 268 is arbitrary and unreasonable and deprives plaintiffs of due process of law in violation of Amendment XIV to the United States Constitution and Article I, Section 7 of the Minnesota Constitution.

COUNT THREE

23. Reallege paragraphs 1 through 19.

24. The provisions of Chapter 268 are so vague, indefinite and ambiguous that its applicability and enforceability are left to arbitrary and whimsical determination, in violation of the due process guarantees of Amendment XIV to the United States Constitution and Article I, Section 7 of the Minnesota Constitution.

COUNT FOUR

25. Reallege paragraphs 1 through 19.

26. Chapter 268 constitutes an unreasonable burden upon interstate commerce to the detriment of plaintiffs and their customers, contrary to the provisions of Article I, Section 8, of the United States Constitution.

## RELIEF SOUGHT

27. By reason of all of the foregoing, there exists a justiciable controversy between plaintiffs and defendant which must be resolved by decree of this Court and plaintiffs are entitled to a declaration of their rights respecting the validity and enforceability of Chapter 268.

28. Unless a temporary injunction is issued by this Court enjoining defendant from implementing and enforcing Chapter 268 until final determination of this action, each plaintiff will suffer irreparable injury and damage for which it has no adequate remedy at law.

29. Issuance of a temporary injunction enjoining defendant from implementing and enforcing Chapter 268 will cause no injury to defendant and will maintain the status quo during the pendency of this action.

WHEREFORE, plaintiffs pray for judgment and decree of this Court as follows:

a. Declaring that Laws of Minnesota 1977, Chapter 268, is null and void and unenforceable.

b. Temporarily and permanently enjoining defendant and any agency, political subdivision or individual acting or purporting to act on behalf of the defendant, from implementing or attempting to enforce, by civil or criminal action, or otherwise, the provisions of Chapter 268.

c. Granting to plaintiffs such other relief as may be just and equitable, including their costs.

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(Summons and Affidavit of Service Omitted in Printing)

STATE OF MINNESOTA — DISTRICT COURT
County of Ramsey — Second Judicial District
(Title Omitted in Printing)

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DEFENDANT'S NOTICE AND MOTION TO DISMISS

To: All Plaintiffs and their attorneys, Briggs and Morgan, Leonard J. Keyes, Esq. and Douglas L. Skor, Esq., 2200 First National Bank Building, St. Paul, Minnesota 55101.

PLEASE TAKE NOTICE that on the 29th day of November, 1977, at 9:30 a.m. or as soon thereafter as counsel may be heard, in room 1109 of the Ramsey County Courthouse, St. Paul, Minnesota, respondents will move for an order dismissing the Complaint for Declaratory Judgment herein. The grounds for this motion are:

1. The Complaint fails to state a claim upon which relief may be granted;

2. Plaintiffs, and each of them lack proper legal status or standing to assert or maintain the purported claims in their complaint;

3. There exists no justiciable case or controversy between plaintiffs and defendant. Rather the Complaint, on its face, amounts to no more than a petition for an advisory opinion of the Court; and

4. The Court lacks jurisdiction over the subject matter of this action.

This motion is made pursuant to Rule 12.02 of the Minnesota Rules of Civil Procedure and is based upon all of the files

and records of the proceeding herein including a memorandum of law to be hereinafter submitted.

Dated: October 18, 1977

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(Affidavit of Service Omitted in Printing)

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STATE OF MINNESOTA — DISTRICT COURT
County of Ramsey — Second Judicial District
(Title Omitted in Printing)

ORDER

The above matter came on for hearing before the undersigned Judge of the District Court at a Special Term on November 29, 1977.

Byron E. Starns, Esq., Chief Deputy Attorney General, and Kenneth E. Raschke, Jr., Assistant Attorney General, appeared on behalf of the State. Leonard J. Keyes, Esq., and Douglas L. Skor, Esq., of Briggs & Morgan, appeared on behalf of Plaintiffs. Thomas V. Bender, Esq., of Peterson, Popovich, Knutson & Flynn, appeared amicus curiae.

The parties appeared on the State's motion to dismiss the complaint for failure to state a claim upon which relief can be granted.

The matter was duly argued on behalf of the Petitioner and Respondents. Memoranda were submitted by the parties, including amicus curiae. The Court, having in mind the arguments of counsel, bases the following order on all proceedings, files and records herein. Now, therefore,

IT IS ORDERED the State's motion to dismiss is hereby denied.

SYDNEY P. ABRAMSON
Judge of District Court

Dated: December 20, 1977.

MEMORANDUM

To withstand the State's motion to dismiss, Plaintiffs need only state a claim upon which relief can be granted. MRCP 12. Plaintiffs allege that the statute in question lacks a rational basis and should be declared unconstitutional. As assumptions and inferences to be drawn from the allegation must be viewed in favor of the Plaintiffs, nothing more is required. *Abbariao v. Hamline University School of Law*, —— Minn. ——, 258 N.W.2d 108 (1977); *Northern States Power Co. v. Franklin*, 265 Minn. 391, 122 N.W.2d 26 (1963).

The remarks of the State and amicus as to the scope and presumptions of a statute's rational basis are not within the consideration of the Court under this motion.

SPA

STATE OF MINNESOTA DISTRICT COURT
County of Ramsey Second Judicial District

(Title Omitted in Printing)

DEFENDANT'S ANSWER

The State of Minnesota for its Answer to the Complaint in the above captioned matter:

A. Denies every allegation contained in the Complaint except as otherwise herein admitted or otherwise qualified.

B. Admits the allegations contained in paragraphs 1, 18 and 19.

C. With respect to paragraphs 2, 4, 6 and 10, admits that the corporations named therein are organized and exist under Minnesota law; and alleges that it is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in those paragraphs.

D. With respect to paragraph 3, admits that Phillips is a Delaware corporation, and alleges that it is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of that paragraph.

E. With respect to paragraph 5, alleges that it is without knowledge sufficient to form a belief as to the truth of the allegations contained therein and further alleges that it believes that Hoover Ball and Bearing Company does not have a certificate of authority to do business in the State of Minnesota pursuant to Minn. Stat. ch. 303 (1976).

F. With respect to paragraph 8, alleges that it is without knowledge or information sufficient to form a belief as to the allegations contained therein and alleges further that it is informed and believes that no trade name of "Johnson Star Market" has been filed with the Clerk of District Court in Anoka County pursuant to Minn. Stat. §§ 333.01-333.06 (1976).

G. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 7, 9, 11, 12, 13, 14, 15, 16 and 17.

H. With respect to paragraphs 21, 23 and 25, realleges its answer contained in paragraphs A. through G.

SEPARATE DEFENSES

In addition, Defendant asserts the following separate defenses:

I. The Complaint fails to allege facts sufficient to state a claim upon which Relief may be granted.

J. There exists no justiciable case or controversy between plaintiffs and defendant. Rather the Complaint, on its face, amounts to no more than a petition for an advisory opinion of the Court in the face of an upcoming legislative session.

K. Neither Uniloy nor Hoover Ball and Bearing Company is entitled to maintain an action in Minnesota without a certificate of authority to transact business therein.

L. Dennis Johnson d/b/a Johnson Star Market is not entitled to maintain an action with respect to such business unless and until a certificate and proof of publication thereof are filed as required by Minn. Stat. §§ 333.01-333.06 (1976).

M. Plaintiffs, and each of them, lack standing to assert or maintain the purported claims in their complaint.

N. Plaintiff The Society of the Plastics Industry, Inc. is not a real party in interest to this action nor a person authorized to seek declaratory relief pursuant to Minn. Stat. § 555.02 (1976).

O. Minn. Laws 1977, Ch. 268 is in all respects constitutional and enforceable.

P. Plaintiffs have failed to join parties necessary to the granting of the relief sought in the Complaint.

WHEREFORE, defendant prays that the Court enter its judgment:

1. Dismissing Plaintiffs' Complaint;

2. Declaring that Minn. Laws 1977, ch. 268 is in all respects valid and enforceable;

3. Denying Plaintiffs all relief prayed for in their Complaint;

4. Granting Defendant its costs and disbursements herein.

Dated: January 4, 1978.

Respectfully submitted,

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(Affidavit of Service Omitted in Printing)

STATE OF MINNESOTA — DISTRICT COURT
County of Ramsey — Second Judicial District

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CLOVER LEAF CREAMERY COMPANY,
PHILLIPS PETROLEUM COMPANY,
MARIGOLD FOODS, INC.,
UNILOY DIVISION OF
HOOVER UNIVERSAL, INC.,
WEBER & BARLOW STORES, INC.,
THE SOCIETY OF THE PLASTICS INDUSTRY, INC.,
WELLS DAIRY, INC., and
M-H PACKAGING SYSTEMS, INC.

Plaintiffs,

vs.

STATE OF MINNESOTA,

Defendant.

---

## FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

This matter was tried by the Court without a jury commencing March 15 and concluding March 21, 1978. Plaintiffs appeared by their attorneys, Leonard J. Keyes, Esq., and Douglas L. Skor, Esq.; defendant, by its attorneys, Byron E. Starns, Esq., Deputy Attorney General and Kenneth E. Raschke, Jr., Esq., Assistant Attorney General.

Upon the evidence adduced at the trial and all of the files and records herein, including the memoranda submitted by counsel, the Court makes the following as

### FINDINGS OF FACT

1. The Court has jurisdiction over the parties and the subject matter; a justiciable controversy exists.

2. Plaintiff Clover Leaf Creamery Company ("Clover Leaf"), a Minnesota corporation, is engaged in the packaging and distribution of milk and milk products within Minnesota and in interestate commerce. It owns equipment which blow-molds plastic milk containers which are not intended to be returned to the retailer for refilling with milk ("nonreturnable, nonrefillable"). It utilizes these containers for marketing of Clover Leaf products, including milk, and also sells them to other dairies for marketing their respective products, including milk.

3. Plaintiff Marigold Foods, Inc. ("Marigold"), a Minnesota corporation, is engaged in the packaging and distribution of milk and milk products within Minnesota and in interstate commerce. It is the lessor of equipment which blow-molds nonreturnable, nonrefillable plastic milk containers for marketing its products, including milk. It has packaged and distributed milk in such containers in Minnesota and elsewhere since 1973.

4. Plaintiff Phillips Petroleum Company ("Phillips"), a Delaware corporation, manufactures polyethylene resin and distributes it in interstate commerce to Minnesota customers, including Clover Leaf. This resin is the material used for the blow-molding of nonreturnable, nonrefillable plastic milk containers.

5. Plaintiff Hoover Ball & Bearing Company has recently changed its corporate name to Hoover Universal, Inc. Plaintiff Uniloy Division of Hoover Universal, Inc. ("Uniloy"), a Michigan corporation, manufactures and sells blow-molding equipment and assessories for the production of nonreturnable, nonrefillable plastic milk containers. It is engaged exclusively in interstate commerce in its Minnesota activities. It has manufactured and sold all of the blow-molding equipment presently utilized in Minnesota for the fabrication of nonreturnable, nonrefillable milk containers.

6. Plaintiff The Society of the Plastics Industry, Inc., ("SPI"), a New York nonprofit corporation, is the principal trade association for the United States plastic industry. It includes in its membership corporation engaged in the production of polyethylene resins, the manufacture and sales of blow-molding equipment and the fabrication of nonreturnable, nonrefillable plastic milk containers. Its members are principally engaged in interstate commerce.

7. Plaintiff Wells Dairy, Inc. ("Wells"), an Iowa corporation, is engaged in the distribution of milk and milk products in interstate commerce in Minnesota and elsewhere. It owns equipment in Iowa which blow-molds nonreturnable, nonrefillable plastic milk containers for such distribution. It has distributed milk in Minnesota in such containers since 1973.

8. Plaintiff M-H Packaging Systems, Inc., ("M-H"), a Minnesota Corporation, has a plant in Ramsey County, Minnesota. In that plant it owns equipment which blow-molds nonreturnable, nonrefillable plastic milk containers for sale to dairies in Minnesota and in interstate commerce.

9. Plaintiff Weber & Barlow Stores, Inc., ("Barlow"), a Minnesota corporation, is engaged in the retail grocery business in Rochester, Minnesota and in outlets in Iowa and North Dakota. Among its products for retail sale is milk packaged in nonreturnable, nonrefillable plastic containers.

10. Plaintiff Dennis Johnson, d/b/a Johnson Star Market ("Johnson") has sold his retail grocery business since this action has been filed and is no longer a real party in interest.

11. In 1977, the Minnesota Legislature enacted a criminal statute, Laws of Minnesota 1977, Chapter 268 (coded as Sections 116F.21 and 22, MSA). Chapter 268 provides:

> "Section 1. (116F.21) (Milk packaging, statement of policy.) The legislature finds that the use of nonre-

turnable, nonrefillable containers for the packaging of milk and other milk products presents a solid waste management problem for the state, promotes energy waste and depletes natural resources. The legislature, therefore, in furtherance of the policies stated in Minnesota Statutes, Section 116F.01, determines that the use of nonreturnable, nonrefillable containers for the packaging of milk and other milk products should be discouraged and that the use of returnable and reusable packaging for these products is preferred and should be encouraged.

Section 2. (116F.22) (Prohibitions) Subdivision 1. No person shall sell at retail or offer for sale at retail in this state any milk or fluid milk products as defined in Minnesota Statutes, Section 32.291, other than sour cream, cottage cheese, and yogurt, in a nonreturnable, non-refillable rigid or semi-rigid container at least 50 percent of which is plastic.

Subd. 2. A violation of subdivision 1 is a misdemeanor and each day of violation is a separate offense."

Laws of Minnesota 1977, Chapter 455, Section 96, provided that the effective date of Chapter 268 is July 1, 1978.

12. Despite the purported policy statement published by the Legislature as its basis for enacting Chapter 268, the actual basis was to promote the economic interests of certain segments of the local dairy and pulpwood industries at the expense of the economic interests of other segments of the dairy industry and the plastics industry.

13. In enacting Chapter 268, the Legislature's published purpose was to discourage the use of nonreturnable, nonrefillable milk containers and encourage the use of returnable milk containers.

14. Chapter 268, if implemented, would not encourage the use of returnable milk containers. It would increase the use of a more expensive and environmentally harmful nonreturnable, nonrefillable paperboard container.

15. In enacting Chapter 268, the Legislature purported to find that the use of nonreturnable, nonrefillable plastic milk containers:

a. Presents a solid waste management problem.

b. Promotes energy waste and depletes natural resources.

16. There is no basis in fact for these findings in the light of Chapter 268's effect of promoting the greater use of paperboard milk containers because:

a. The nonreturnable, nonrefillable plastic milk containers in use today present fewer solid waste management problems than do paperboard containers. Their quantitative contribution to the solid waste stream is miniscule.

b. The plastic milk containers constitute a stable, inert contribution to the landfills. They incinerate almost completely with nonnoxious emissions. They provide approximately 20,000 BTU's of heat during incineration and permit total combustion of other waste products. On the other hand, paperboard milk cartons decay in landfills and contribute to landfill instability, permit seepage of leachate into underground water supplies and produce inflammable and explosive methane gas. They provide approximately 7,000 BTU's of heat during combustion and emit a small amount of noxious gases into the atmosphere.

c. As long as there is petroleum, there will be polyethylene, a petroleum by-product which is used for many purposes in addition to the manufacture of milk containers. Both petroleum and wood are natural resources subject to depletion from innumerable sources, one of the least being milk containers.

17. In enacting Chapter 268, the Legislature purported to rely on a number of policy goals found in Section 116F.01, M.S.A.:

a. To encourage the reduction of the amount and type of materials entering the solid waste stream.

b. To encourage the reuse and recycling of materials.

c. To encourage the design and implementation of regional programs for materials conservation which take into account the variations in solid waste generation in Minnesota.

18. Chapter 268, if implemented, will not succeed in effecting the Legislature's published policy goals because nonreturnable, nonrefillable plastic milk containers will be substantially replaced on the market by nonreturnable, nonrefillable paperboard milk containers. The effects of this replacement on the published goals are:

a. Reduction of the amount and types of materials entering the solid waste system is not encouraged. Gallon paperboard containers weigh almost twice as much as gallon plastic containers and have a greater volume; they occupy substantially the same amount of landfill space after compaction and are coated with polyethylene.

b. Reuse and recycling of materials is not encouraged. Nonreturnable, nonrefillable plastic milk containers are recyclable. Nonreturnable, nonrefillable paperboard milk containers are neither reusable nor recyclable.

c. Chapter 268 does not address the subject of encouraging the design and implementation of regional programs for materials conservation which take into account the variations in solid waste generation in Minnesota.

19. Chapter 268 does not serve a public purpose.

20. The means chosen by Chapter 268 bear no rational relation to the public purpose purported to be served.

21. Chapter 268 is an unreasonable, arbitrary and capricious interference with the production, marketing and consumption of milk and milk products to the detriment of each of the plaintiffs and many members of plaintiff SPI.

22. Chapter 268 bans only nonreturnable, nonrefillable plastic containers of milk and certain milk products. It does not affect any other milk container or any package of any other substance whatsoever. This classification is unreasonable and arbitrary. It bears no rational relationship to the purported objects of Chapter 268.

23. Despite the purported policy reasons published by the Legislature as bases for enacting Chapter 268, actual bases were to isolate from interstate competition the interests of certain segments of the local dairy and pulpwood industries. The economic welfare of such local interests can be promoted without the remedies prescribed in Chapter 268.

24. The substantial burdens imposed on interstate commerce by Chapter 268 are impermissible. For example, Chapter 268, if implemented, would effectively prevent:

a. Plaintiff Wells and all out of state dairies who market milk in Minnesota in interstate commerce from marketing it in Minnesota in nonreturnable, nonrefillable plastic containers.

b. Plaintiff Clover Leaf from marketing milk interstate in nonreturnable, nonrefillable plastic containers or marketing such containers interstate.

c. Plaintiff M-H from marketing such containers interstate.

d. Plaintiff Uniloy and all other out of state manufacturers and distributors of blow-molding equipment in interstate commerce from selling such equipment in Minnesota for the purpose of fabricating nonreturnable, nonrefillable plastic milk containers.

e. Plaintiff Phillips and all other out of state suppliers of polyethylene resin in interstate commerce from selling their product in Minnesota for the purpose of fabricating non-returnable, nonrefillable plastic milk containers.

From the foregoing Findings of Fact, the Court makes the following as

CONCLUSIONS OF LAW

1. Chapter 268 deprives each of the plaintiffs and many members of plaintiff SPI of substantive due process of law in contravention of Amendment XIV to the United States Constitution and Article I, Section 7 of the Minnesota Constitution.

2. Chapter 268 deprives each of the plaintiffs and many of the members of plaintiff SPI of the equal protection of the laws guaranteed by Amendment XIV to the United States Constitution.

3. Chapter 268 constitutes an unreasonable burden on interstate commerce conducted by plaintiffs and many members of plaintiff SPI in contravention of Article I, Section 8, United States Constitution.

4. If Chapter 268 becomes effective, each plaintiff and many members of plaintiff SPI will suffer irreparable injury and harm for which none has an adequate remedy at law.

5. Laws of Minnesota, 1977, Chapter 268, is null, void and unenforceable.

6. Defendant State of Minnesota and its agencies, political subdivisions and individuals acting or purporting to act on its behalf are permanently enjoined from implementing or attempting to enforce by civil or criminal action or otherwise the provisions of Laws of Minnesota, 1977, Chapter 268.

7. Plaintiffs are entitled to recover from defendant their costs and disbursements.

8. The attached Memorandum shall be deemed to be a part of the Findings of Fact and Conclusions of Law herein.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: This 5th day of April, 1978.

DAVID E. MARSDEN
Judge of District Court

MEMORANDUM

The standards by which constitutionality of the statute must be determined are well settled.

Chapter 268 is clothed with a presumption of validity and may not be struck down unless its infirmity has been established beyond a reasonable doubt.

Likewise, a Court may not substitute its judgment for that of the legislature as to the wisdom or desirability of the act.

The plaintiffs have satisfied the burden imposed upon them.

No other jurisdiction in the entire country has enacted legislation comparable to Chapter 268.

New York City enacted a city ordinance imposing a tax solely on plastic containers. That gave rise to *Society of Plastics Industry v. New York City*, 3 ERC 1370 (1971) where the trial court, in a comprehensive opinion, held the ordinance unconstitutional.

No controlling appellate decision exist.

The relevant legislative history of Chapter 268 support a conclusion that the real basis for it was to serve certain economic interests (paper, pulpwood, and some dairies) at the expense of other competing economic groups (plastic and certain dairies) by prohibiting the plastic milk bottle.

If, indeed, there were substantial environmental factors favoring the use of the paper milk carton, an entirely different situation would be presented. Such is not the case.

Despite the laudable purposes to which the statute purports to address itself, the evidence overwhelming establishes that the enunciated goals will not be achieved.

The history of the use of returnable bottles, both nationally and locally, is revealing. The trends of public acceptance clearly establish a marked preference for nonreturnable forms of packaging.

The evidence presented in this case requires the conclusion that banning plastic containers will only increase the use of paper containers. Defendant has offered no credible evidence showing that an increased use of returnables would be realized.

Thus, reliance on compared superiority of returnables versus nonreturnables, as it affects the problems of post consumer solid waste, as a means of justifying the statute, is without persuasive effect.

Considerable testimony was presented as to the relative merits of plastic versus paper containers. Certain expert witnesses appeared for the plaintiffs and defendant. Numerous exhibits were received.

The Court, as fact-finder, is obliged to weigh and evaluate this evidence, much of which was in sharp conflict. The opinions of witnesses appearing for the plaintiffs are deemed to be entitled to great weight. They were supported by impartial indepth studies done by the Midwest Research Institute for the United States Environmental Protection Agency.

Defendant's experts, on the other hand, expressed opinions which were not persuasive. The foundation for those views was weak and inconclusive. Indeed, "qualitative" factors were emphasized beyond the "quantitative" factors. They were acknowledged to be more judgmental in nature. The opinions ignored certain relevant factors and placed undue

emphasis on other factors, and thus lacked convincing quality.

In *Federal Distillers, Inc. v. State*, 304 Minn. 28, 229 N.W. 2d 144, 157-158 (1975), our Supreme Court set out the substantive process requirements of a statute as follows:

> "(1) That the act serve to promote a public purpose; (2) that it not be an unreasonable, arbitrary or capricious interference; and (3) that the means chosen bear a rational relation to the public purpose sought to be served."

Mere assertions in the preamble of the statute will not save its constitutionality, when as here, its effects are arbitrary and unreasonable. The additional requirements of "rational relation" is likewise absent.

Plaintiffs have established a violation of their constitutionally protected due process rights.

For similar reasons the statute violates equal protection rights which require that affected classifications be reasonable, not arbitrary, and based upon differences having a fair and substantial relation to the object of the legislature.

*Reed v. Reed*, 404 U.S. 71, 76 (1971)

Plaintiffs have argued as follows:

"The State has singled out the plastic milk container. It has done nothing to reduce or eliminate the use of the other nonreturnable container of the same product which is more environmentally harmful. It has done nothing to regulate the use of containers of other products which pose more immediate problems, such as littering, and which contribute huge volumes to the solid waste stream. It has done nothing about the use of the very same plastic container, by the very same dairies and stores, for fruit juices. It has done nothing about the myriad nonreturnable, nonrefillable plastic containers used to package non-food products. With no rational basis for

its action, it has simply deprived the dairy industry and the consumer of the best container ever devised for milk."

I concur.

Finally, the statute impedes the flow of interstate commerce without providing adequate offsetting local benefits. This is especially true as respects the wholesalers and distributors of milk and ultimately the dairy farmers who sell their product to plaintiffs such as Clover Leaf, Marigold and Wells. They are placed in a disadvantaged position in the market. The highly competitive nature of the milk industry must be acknowledged and taken into account.

In *Hunt v. Washington State Apple Advertising Comm'n.*, 432 U.S. 333, 97 S.Ct. 2434, 2446 (1977), the U.S. Supreme Court said

> "When discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives, adequate to preserve the local interests at stake."

Here the "local benefits" have been shown to be illusory or insubstantial, except for the economic advantages provided the paper and pulpwood industry.

In addition to these claims, plaintiffs have also asserted the statute is so vague, indefinite and ambiguous that its applications and enforcement are left to arbitrary determinations.

In view of the determinations as set forth herein, it is unnecessary to reach or determine the vagueness argument.

D.E.M.

STATE OF MINNESOTA
County of Ramsey

DISTRICT COURT
Second Judicial District

CLOVER LEAF CREAMERY COMPANY,
PHILLIPS PETROLEUM COMPANY,
MARIGOLD FOODS, INC.,
UNILOY DIVISION OF
HOOVER UNIVERSAL, INC.,
WEBER & BARLOW STORES, INC.,
THE SOCIETY OF THE PLASTICS INDUSTRY, INC.,
WELLS DAIRY, INC., AND
M-H PACKAGING SYSTEMS, INC.

Plaintiffs,

vs.

STATE OF MINNESOTA,

Defendant.

JUDGMENT ROLL

Pursuant to the Findings Of Fact, Conclusions Of Law and Order For Judgment, Marsden, J., dated and filed April 5, 1978 which states the following:

1. Chapter 268 deprives each of the plaintiffs and many members of plaintiff SPI of substantive due process of law in contravention of Amendment XIV to the United States Constitution and Article I, Section 7 of the Minnesota Constitution.

2. Chapter 268 deprives each of the plaintiffs and many of the members of plaintiff SPI of the equal protection of the laws guaranteed by Amendment XIV to the United States Constitution.

3. Chapter 268 constitutes an unreasonable burden on interstate commerce conducted by plaintiffs and many members of plaintiff SPI in contravention of Article I, Section 8, United States Constitution.

4. If Chapter 268 becomes effective, each plaintiff and many members of plaintiff SPI will suffer irreparable injury and harm for which none has an adequate remedy at law.

5. Laws of Minnesota, 1977, Chapter 268, is null, void and unenforceable.

6. Defendant State of Minnesota and its agencies, political subdivisions and individuals acting or purporting to act on its behalf are permanently enjoined from implementing or attempting to enforce by civil or criminal action or otherwise the provisions of Laws of Minnesota, 1977, Chapter 268.

7. Plaintiffs are entitled to recover from defendant their costs and disbursements.

Now, on motion of Leonard J. Keyes, said Attorney, IT IS HEREBY ADJUDGED that judgment is entered in favor of the Plaintiffs in the manner as stated above (Plaintiffs waive costs and disbursements)

Signed this 7th day of April A.D. 1978

HAZEL G. ARTH
Clerk
By NELL M. MONTGOMERY
Deputy Clerk

STATE OF MINNESOTA DISTRICT COURT
County of Ramsey Second Judicial District

(Title Omitted in Printing)

NOTICE OF APPEAL

To: Leonard J. Keyes and Douglas L. Skor, Attorneys for Plaintiffs:

PLEASE TAKE NOTICE, that the defendant, State of Minnesota, appeals to the Supreme Court of the State of Minnesota from the Judgment of the District Court entered on April 7, 1978 in the above-captioned matter.

Dated April 10, 1978.

WARREN SPANNAUS
Attorney General
State of Minnesota
By BYRON E. STARNS
Chief Deputy
Attorney General
and KENNETH E.
RASCHKE, JR.
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Attorneys for Defendant
State of Minnesota

(Affidavit of Service Omitted in Printing)

STATE OF MINNESOTA
IN SUPREME COURT
No. 48827

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CLOVER LEAF CREAMERY COMPANY, et al.,
Respondents,

vs.

STATE OF MINNESOTA,
Appellant.

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Peterson, J.
Dissenting,
Wahl, J.
Endorsed
Filed September 7, 1979
John McCarthy, Clerk
Minnesota Supreme Court

SYLLABUS

Laws 1977, c. 268, which creates a statutory classification whereby plastic nonrefillable milk containers are banned and paper milk containers are preserved, violates the equal protection clause of the Fourteenth Amendment to the United States Constitution, because the classification is not rationally related to a legitimate state interest:

(a) The evidence conclusively demonstrates that in the categories of solid waste management, energy waste, and depletion of natural resources (matters of specific concern in the Act), the environmental effects of paper milk containers are not less harmful than the environmental effects of plastic nonrefillable milk containers; and

(b) The evidence further establishes that the classification will not promote the Act's stated goal of encouraging the use of refillable milk containers.

Affirmed.

Heard, considered, and decided by the court en banc.

OPINION

PETERSON, Justice.

Defendant, state of Minnesota, appeals from the trial court's judgment in favor of plaintiffs,[1] holding L. 1977, c. 268 (the Act), to be unconstitutional.[2] We affirm the trial court's judgment and hold that the Act violates the equal protection clause of the Fourteenth Amendment to the United States Constitution, because it establishes a classification which is not rationally related to a legitimate state interest.

The Act, approved on May 26, 1977, provides:

> "Section 1. The legislature finds that the use of nonreturnable, nonrefillable containers for the packaging of milk and other milk products presents a solid waste management problem for the state, promotes energy waste and depletes natural resources. The legislature therefore,

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[1] Plaintiffs generally may be divided into two categories—those involved in the packaging and sale of milk; those involved in the production and sale of plastic goods and associated equipment.

The first category includes:

1. Clover Leaf Creamery Company.
2. Marigold Foods, Inc.
3. Wells Dairy, Inc.
4. Weber & Barlow Stores, Inc.

The second category includes:

1. The Society of the Plastics Industry, Inc.
2. Phillips Petroleum Company
3. Hoover Universal, Inc., formerly Hoover Ball and Bearing Company
4. M-H Packaging Systems, Inc.

[2] The trial court held L. 1977, c. 268, to be unconstitutional on three grounds:

(1) The act deprives plaintiffs of equal protection of the law in contravention of U. S. Const. Amend. XIV;

(2) The Act deprives plaintiffs of substantive due process of law in contravention of U. S. Const. Amend XIV and Minn. Const. art. 1, § 7; and

(3) The act constitutes an unreasonable burden upon interstate commerce in contravention of U. S. Const. art. I, § 8.

in furtherance of the policies stated in Minnesota Statutes, Section 116F.01, determines that the use of nonreturnable, nonrefillable containers for packaging milk and other milk products should be discouraged and that the use of returnable and reusable packaging for these products is preferred and should be encouraged.[3]

"Sec. 2. Subdivision 1. No person shall sell at retail or offer for sale at retail in this state any milk or fluid milk product as defined in Minnesota Statutes, Section 32.391, other than sour cream, cottage cheese and yogurt, in a non-returnable, nonrefillable rigid or semi-rigid container at least 50 percent of which is plastic.

Subd. 2. A violation of Subdivision 1 is a misdemeanor and each day of violation is a separate offense.[4]

"Sec. 3. This act is effective July 1, 1977."[5]

We note three specific aspects of this unique statute:[6] (1) The Act does not, under any circumstances, permit the use of nonrefillable[7] plastic containers for milk;[8] (2) milk is the

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[3] Laws 1977, c. 268, § 1, codified as Minn. St. 116F.21.

[4] Laws 1977, c. 268, § 2, codified as Minn. St. 116F.22.

[5] Laws 1977, c. 455, § 96, superseded L. 1977, c. 268, § 3, and provided, in part: "Notwithstanding any law to the contrary, no prohibition on the retail sale or the offer for retail sale of milk in nonreturnable, nonrefillable plastic containers shall be effective prior to July 1, 1978."

[6] Minnesota is the only state that has legislatively banned nonrefillable plastic milk containers. Ontario, Canada, has banned both plastic and paper nonrefillable milk containers by executive action.

[7] The Act mentions "nonreturnable, nonrefillable containers." A container can be returnable without being refillable. For example, the plastic milk bottle banned by the Act can be returned for recycling, but it cannot be used again to package milk. The term "nonrefillables" is therefore used throughout this opinion to describe milk containers which cannot be used again for the same purpose.

[8] The container referred to is a high density polyethylene plastic container which cannot be returned to the dairy to be refilled with milk for sale to consumers. For the remainder of the opinion, these containers will be referred to as "plastic nonrefillables."

only commodity affected by the Act, plastic containers are not banned unless they are filled with milk; and (3) only plastic nonrefillable milk containers are affected by the Act, paper nonrefillable milk containers are not affected.[9]

Plaintiffs contend the Act violates the equal protection clause of the Fourteenth Amendment because it creates a classification in which paper containers are to be preserved while plastic nonrefillables are to be banned. Because the present statute involves economic regulation, the relevant test is whether the classification is rationally related to a legitimate state interest. New Orleans v. Dukes, 427 U. S. 297, 96 S. Ct. 2513, 49 L. ed. 2d 511 (1976). Plaintiffs argue that a rational classification is not established because, from an environmental standpoint, paper containers are not superior to plastic nonrefillables, and a ban on plastic nonrefillables will serve to encourage the use of paper containers instead of serving to encourage the use of refillable milk containers.

The Act is intended to further the policies stated in Minn. St. 116F.01; therefore, it is intended to promote the state interests of encouraging the reuse and recycling of materials and reducing the amount and type of material entering the solid waste stream. L. 1977, c. 268, § 1. Specifically, the stated legislative finding of the Act is that nonrefillable milk containers present solid waste management problems, promote energy waste, and deplete natural resources; the stated legislative goal is that use of returnable milk containers should be

[9] The container referred to is a plastic coated, paperboard container which cannot be returned to the dairy to be refilled with milk for sale to customers. The container is composed of bleached kraft paper coated with low density polyethylene, a plastic related to that used in plastic nonrefillable milk containers. Low density polyethylene comprises about 10 percent of the weight of the container. For the remainder of the opinion, these containers will be referred to as "paper containers."

encouraged. L. 1977, c. 268, § 1. The Act, undoubtedly, deals with legitimate state interests. The crucial question is whether the classification separating paper containers from plastic nonrefillables is reasonably related to these state interests.

We are aware of the deference that is accorded to the legislature when the present type of statute is analyzed on equal protection grounds. Nevertheless, our inquiry into the constitutional propriety of the present classification separating paper containers from plastic nonrefillables is dependent upon facts. Based upon the relevant findings of fact by the trial court, supported by the record, and upon our own independent review of documentary sources, we believe the evidence conclusively demonstrates that the discrimination against plastic nonrefillables is not rationally related to the Act's objectives. Considering only the specific areas of solid waste management, energy waste, and depletion of natural resources, it is clear that the environmental effects of paper containers are not less harmful than the effects of plastic nonrefillables. It is also apparent that the classification will not further the Act's stated goal of encouraging the use of refillable milk containers.

The record supports the trial court's finding that plastic nonrefillables present fewer solid waste management problems than paper containers. The major method of solid waste disposal is by landfill deposit. The evidence at trial established that plastic nonrefillables are superior to paper containers for landfill disposal.

Defendant's expert witnesses agreed that the principal environmental hazards posed by landfill disposal are pollution of underground water, which is caused by leaching, and the creation and escape of methane gas. Both of these environmental hazards are created by waste decomposition. Bacterial

and other chemical reactions, combined with percolation of water and other liquids, create leachates which seep into the ground and ultimately into underground water. The same reactions create methane gas, which is both noxious and explosive. Paper milk containers contribute to these environmental hazards because they begin to decompose as soon as the plastic coating on the exterior of the container is punctured or torn. Plastic nonrefillables are essentially inert and therefore do not contribute to the creation of leachates and methane gas.

Maintaining landfill stability is important in landfill disposal for two reasons. First, stability minimizes cracking of the final landfill cover. Such cracking results in the generation of leachates. Second, landfill stability encourages productive use of the landfill site after the landfill project is completed. Because waste decomposition creates landfill instability, plastic nonrefillables contribute to landfill stability while paper containers do not.

The trial court's finding that plastic nonrefillables and paper containers occupy substantially the same amount of landfill space is also justified by the evidence. Plastic nonrefillables contain less raw material and have greater density than paper containers. If total compaction (no void spaces left in containers) is achieved, plastic nonrefillables will occupy less landfill space. The evidence at trial demonstrated that during collection waste is typically compacted to a fraction of its original volume, that it is compacted further when deposited at the landfill, and that it has continual pressure exerted upon it as other layers of waste are deposited. Under these conditions, there is no basis for asserting that plastic nonre-

fillables occupy more landfill space than paper containers.[10]

Data in a 1977 final report by Midwest Research Institute (MRI) and the United States Environmental Protection Agency (EPA)[11] supports defendant's argument that plastic nonrefillables take more landfill space than paper containers; however, accuracy of the figures in the MRI report was persuasively attacked by plaintiffs' expert witnesses. Highly significant was the testimony of Richard Welch, a chief investigator involved in the MRI report. Welch indicated that in the first draft of the MRI report it was assumed, based upon conversations with experts, that plastic nonrefillables and paper containers would compress to within 10 percent of their original volume. The American Paper Institute then provided MRI with a study prepared by the Weyerhaeuser Corporation involving the compressibility of milk containers. The test used in the Weyerhaeuser study indicated that paper was superior to plastic. MRI incorporated the Weyerhaeuser finding in its final report because no other written documentation was available. Welch criticized the test conducted by Weyerhaeuser because it neglected to specify the weights of the containers

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[10] Plaintiffs provided a relevant demonstration of compaction during the cross-examination of defendant's solid waste expert, Harold Samtur. Counsel for plaintiff crushed samples of both containers with his bare hands. Samtur estimated that the crushed volume of each container was between 10 and 20 percent of its original volume. He further acknowledged that there was virtually no springback of the plastic nonrefillable after it had been crushed and released and that the springback which did occur could be eliminated by squeezing the container between thumb and forefinger.

[11] The report, entitled "Resource and Environmental Profile Analysis of Five Milk Container Systems," was an objective quantification of resource and environmental impacts associated with five milk container systems, including paper containers and plastic nonrefillables, and was the primary source of documentary evidence at trial on the environmental effects of paper containers and plastic nonrefillables. For the remainder of this opinion, the report will be referred to as the "MRI report."

used and because the test was conducted in a laboratory, not under conditions approximating those found in a landfill.[12] William E. Ades of the EPA testified that he too was less confident of compressibility figures in the MRI report than of figures in other categories of container comparison. Welch further testified there was insufficient evidence to conclude that either type of container would consume more landfill space than the other. The contrary conclusion of defendant's solid waste expert, Harold Samtur, was based upon a weak and inconclusive foundation[13] and, as the trial court indicated, lacked convincing quality.

Solid waste disposal is also achieved by incineration, a method of disposal in which plastic nonrefillables are superior to paper containers. Although currently not widespread, incineration will become more prevalent as technology advances and the energy value of the heat generated by it can be economically utilized. Both plastic nonrefillables and paper containers burn, but plastic nonrefillables have a much higher Btu value, which results in the recovery of more energy than

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[12] In this test, the volume of a container was measured after the container was crushed with a laboratory device and the device was totally released, with no continual pressure exerted upon the container. The evidence at trial indicated waste is compacted to a fraction of its original volume during collection, is compacted even further when deposited at a landfill, and has continual pressure exerted upon it as other layers of waste are deposited.

[13] Harold Samtur relied upon three sources for his conclusion: One, the MRI report. (Samtur accepted the compressibility figures of the MRI report without examining their derivation, in spite of Welch's testimony about their inadequacy.) Two, a 1972 report prepared by a milk packaging working group for the Ministry of the Environment in the Province of Ontario, Canada. (The Ontario researchers estimated the compaction ratio for a refillable plastic milk container and then assumed that the much lighter plastic nonrefillable would consume the same space. The group also used a nonrefillable plastic milk container incomparable to the container now used in Minnesota, because it was almost 50 percent heavier and was more difficult to crush.) Three, a 1969 study, the "Eggshell Report," on the disposable characteristics of containers. (The study did not include samples of milk containers.)

can be recovered from burning paper containers. Moreover, plastic nonrefillables incinerate completely and do not emit noxious gases into the atmosphere, while paper containers leave residue and emit small amounts of noxious gases.

Recycling is yet another method of solid waste disposal. One of the express purposes of Minn. St. c. 116F is to encourage the reuse and recycling of materials. Plastic nonrefillables are recyclable because they can be ground and used to make a large number of polyethylene products.[14] Paper containers are not recyclable because the paperboard and the plastic coating cannot be separated.

"Source reduction" is a further aid in solid waste management and is similarly an express goal of Minn. St. c. 116F. In the present case, the major relevant source-reduction factor is the constantly declining weight of plastic nonrefillables. Plastic nonrefillables weigh a fraction more than half the weight of paper containers and therefore generate less waste. While the unit weight of gallon paper containers has remained at 115 grams or more for at least the past 5 years, improvements in resin, production machinery, and container design have brought about substantial reduction in the weight of plastic nonrefillables.[15] Such a reduction in weight causes a

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[14] The evidence indicates that plaintiff Clover Leaf Creamery Company has a voluntary plastic milk container recycling program. Clover Leaf picks up plastic milk containers that are returned to retail stores, grinds them, and sells the plastic material to a salvage dealer.

[15] In 1964, gallon plastic nonrefillables made on blow-molding machines manufactured by plaintiff Hoover Universal, Inc. weighed 100 grams per unit. By 1973, plastic nonrefillables generally used in the dairy industry weighed 70 grams each, the weight used in the MRI report. Blow-molding machines are currently manufactured to mold 60-gram bottles. The average weight used throughout the country, including Minnesota, is currently 65 grams. One Hoover dairy customer presently uses 57-gram containers.

proportional decrease in the amount of raw material used and the amount of waste generated, along with lessened impacts in other environmental categories.[16]

The evidence conclusively demonstrates that plastic nonrefillables present fewer solid waste problems than paper containers.

Similarly, in the category of energy waste, the evidence establishes that paper containers are not superior to plastic nonrefillables. While the figures in the MRI report on energy consumption support defendant's position that less energy is required to produce paper containers, the accuracy of the figures was successfully eroded by plaintiffs. Computed in the MRI report were two values for the amount of energy consumed in the production of paper containers. The higher figure included, while the lower figure excluded, the energy value of the wood waste (wood bark and sawdust) generated by the paper manufacturing process. When MRI included the energy value derived from burning wood waste (resulting in a higher figure and a higher level of adverse environmental impact), paper containers were slightly superior to plastic nonrefillables. When MRI did not include the energy value derived from burning wood waste (resulting in a lower figure and a lower level of environmental impact), paper containers were superior. However, MRI's figures for plastic nonrefillables did not take into consideration the effect of the energy value of the waste gases produced in making high density polyethylene. Welch, a chief investigator in the MRI report, testified that a meaningful comparison between plastic

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[16] Defendant argues that some reduction will occur under the Act, because use of refillable milk containers will be encouraged. As discussed later in this opinion, the evidence conclusively demonstrates that increased use of refillable milk containers will not be the result of a ban on plastic nonrefillables.

nonrefillables and paper containers in the category of energy consumption requires inclusion of wood waste energy in computing the amount of energy consumed in producing paper containers. Welch's testimony was properly credited by the trial court.[17] In its tests, MRI used plastic nonrefillables weighing 70 grams. The average weight of plastic nonrefillables now used in Minnesota is 65 grams. If 65-gram plastic nonrefillables are used and the energy value derived from burning wood waste is included in energy consumption figures for paper containers, the figures demonstrate that production of plastic nonrefillables requires less energy than production of paper containers.[18]

The evidence introduced at trial therefore demonstrates that production of plastic nonrefillables does not require more energy than production of paper containers. The evidence also establishes that the amount of oil and natural gas consumed in the production of high density polyethylene for plastic nonrefillables is negligible and that banning plastic nonrefillables will not increase the volume of natural gas or oil presently marketed for heating or fuel purposes. Thus, drawing a distinction between plastic nonrefillables and paper containers

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[17] The evidence at trial indicated that the petroleum industry has, for years, used waste gases to fuel or power various processes. However, it is difficult to pinpoint what amount of energy used in petrochemical processing represents waste energy. The plastics industry generally does not break down the sources of energy used in these processes, because it would be extremely difficult to engage in such an inquiry.

[18] Furthermore, the evidence demonstrates that if the energy value of raw material in each container is excluded or included in determining the amount of energy needed to produce the container, plastic nonrefillables are environmentally superior to paper containers.

Richard Welch, a chief investigator for MRI, concluded that the energy impact of plastic nonrefillables and paper containers is virtually the same.

is not reasonably related to the state's interest in preventing energy waste.

Furthermore, drawing a distinction between plastic nonrefillables and paper containers is not reasonably related to the state's interest in conserving natural resources. In spite of the fact that timber is considered to be a renewable resource and oil and natural gas are considered to be nonrenewable resources, the evidence demonstrates that banning plastic nonrefillables will not result in lower consumption of natural resources. The amount of crude oil and natural gas used for producing plastic nonrefillables is so small that a ban on plastic nonrefillables will not alter the volume of resources consumed for non-fuel purposes. If any container is likely to have the potential for reducing depletion of natural resources, it is the plastic nonrefillable. The record establishes that the weight of plastic nonrefillables is continually being reduced and that plastic nonrefillables are recyclable.[19]

The evidence conclusively establishes that the stated goal of the Act, to encourage or promote a return to the use of refillable milk containers, will not be furthered by banning plastic nonrefillables. In 1977, plaintiff Clover Leaf Creamery Company made an effort to revive refillable milk containers in Minnesota and found that consumers would not purchase milk in refillable bottles, even when the only alternatives in some instances were paper containers. Clover Leaf was forced

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[19] When other environmental factors are considered, the superiority of plastic nonrefillables is more evident. For example, the MRI report analyzed factors in addition to energy and compressibility. Using 70-gram plastic nonrefillables, the study demonstrated that production of paper containers (1) consumes more water; (2) generates more water-borne waste; (3) consumes greater quantities of raw materials; and (4) generates more industrial solid waste than plastic nonrefillables. However, the MRI report indicated that paper containers are environmentally superior in the category of atmospheric emissions.

to take back large quantities of milk and finally sold several thousand unused refillable containers at a loss. The rejection of refillable containers occurred even though the cost to retailers was 4 cents less per gallon for returnable containers than for nonrefillable containers and even though thousands of dollars were spent in promoting refillable milk containers. The evidence also indicated that in Ontario, where both plastic nonrefillables and paper containers were administratively banned in 1972, consumers have turned to a third nonrefillable container, the "plastic pouch," as an alternative to refillable containers. Whereas 47 percent of the milk containers used in Ontario in 1971 were refillable, in 1977, the percentage was 19.7.

The evidence demonstrates that convenience is an important factor for consumers and that consumers will therefore use paper containers instead of refillables if plastic nonrefillables are banned. The environmental effects of producing, using, and disposing of paper containers are not less harmful than the environmental effects associated with plastic nonrefillables.

Defendant argues that even if it is assumed that paper containers are not environmentally superior to plastic nonrefillables, the classification drawn in the Act is rationally related to another legitimate state interest — prohibiting the use of plastic nonrefillables before a significant foothold is acquired in the Minnesota milk market.

Defendant argues that the Act was initiated in response to a move in late 1976 by major Minnesota dairies to a long term commitment to packaging milk in plastic nonrefillables. Defendant reasons that the undoubted consumer convenience of plastic nonrefillables combined with the capital investment in machinery designed to produce plastic nonrefillables and the

economic gains to be made by maximizing production would have effectively eliminated any likelihood that the Minnesota dairy industry would later voluntarily turn to refillable containers. Defendant also argues that because nationwide trends indicate plastic nonrefillables dominate in any milk market, it may have been the legislature's concern that if it failed to ban plastic nonrefillables, future regulation against plastic nonrefillables would become too disruptive economically and therefore impossible to achieve. In other words, defendant asserts that the legislature may have believed that if action was not taken to limit the introduction of plastic nonrefillables, they would become immovably entrenched in Minnesota. The evidence indicates, however, that in the early 1970's use of plastic nonrefillables had been established in many areas of Minnesota, excluding the Twin Cities metropolitan area.

The state interest asserted by defendant is, on this record, speculative and illusory. The gravamen of defendant's argument is that by presently banning plastic nonrefillables, the legislature will, in the future, be better able to promote environmentally sound milk packaging, such as refillable containers. However, the evidence at trial indicates that the Minnesota Pollution Control Agency does not presently plan to take or propose further action on the subject of milk containers. Similarly, action by the Minnesota Legislature is uncertain, if not highly doubtful. The original version of the Act included a provision banning paper containers, but that provision was eventually removed from the Act. There is no evidence, therefore, that paper containers will cease to be used in the Minnesota milk market. Because paper containers are not environmentally superior to plastic nonrefillables, any

asserted environmental benefit in preventing plastic nonrefillables from being widely used in Minnesota is illusory.

Defendant nevertheless contends that the Act should be upheld as a first step toward solving the overall problem of milk container waste. We do not doubt that legislatures may implement economic programs step by step, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. See, e.g., Katzenbach v. Morgan, 384 U.S. 641, 86 S.Ct. 1717, 16 L.ed 2d 828 (1966); Williamson v. Lee Optical Co. 348 U.S. 483, 75 S.Ct. 461, 99 L.ed 563 (1955). However, such a step must, at the very least, have a rational relationship to achievement of a legitimate state interest. In the present case, the result of the Act, at best, will not be a step toward amelioration of a perceived evil. The evidence is conclusive that paper containers are not environmentally superior to plastic nonrefillables.

We hold that the Act violates the equal protection clause of the Fourteenth Amendment to the United States Constitution because it establishes a classification which is not rationally related to a legitimate state interest.[20]

Affirmed.

WAHL, Justice (dissenting).

While I am persuaded by the evidence cited by the majority which indicates that plastic nonrefillables are no worse, from

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[20] The trial court treated plaintiffs' equal protection and substantive due process attacks as separate questions; but under substantive due process analysis, the means chosen by the challenged legislation similarly must bear a rational relation to the public purpose sought to be served. See, e.g., Federal Distillers, Inc. v. State, 304 Minn. 28, 46, 229 N. W. 2d 144, 158 (1975). The trial court also concluded that the Act constitutes an unreasonable burden on interstate commerce in contravention of art. I, § 8, of the United States Constitution; but because of our decision on equal protection grounds, we do not consider that issue.

an environmental standpoint, than paper nonrefillables, I cannot agree that the plastic nonrefillables ban, struck down today, is not "rationally related to a legitimate state interest." I view it as a constitutionally permissible "first step" in a pro-environmental effort on the part of the legislature.

The Court in New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.ed 511 (1976), upheld, *per curiam*, the constitutionality of a New Orleans ordinance prohibiting the sale of foodstuffs from pushcarts, except by vendors who had continually operated such a vending business within the French Quarter for 8 years. That classification effectively operated to disqualify all food vendors except two, and there was no reason to believe the two were more likely than any others to "preserve the traditions" of the French Quarter, the ordinance's alleged purpose. To the charge that the classification was "a totally arbitrary and irrational method of achieving the city's purpose," the Supreme Court answered:

> "* * * rather than proceeding by the immediate and absolute abolition of all pushcart food vendors, the city could rationally choose initially to eliminate vendors of more recent vintage. This gradual approach to the problem is not constitutionally impermissible." 427 U.S. at 305, 96 S.Ct. at 2517.

The court articulated the role of the judiciary with respect to legislative economic regulations as follows:

> "States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step by step, *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed. 2d 828 (1966), in such economic areas, adopting regulations that only par-

tially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. See, *e.g.*, *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-489, 75 S.Ct. 461, 464-65, 99 L.Ed. 563 (1955). In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines, see, *e.g.*, *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423, 72 S.Ct. 405, 407, 96 L.Ed. 469 (1952); in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment. See, *e.g.*, *Ferguson v. Skrupa*, 372 U.S. 726, 732, 83 S.Ct. 1028, 1032, 10 L.Ed. 2d 93 (1963)." 427 U.S. at 303-304, 96 S.Ct. at 2517.

Given such instruction by the highest court in the land, I fail to see how we can distinguish the milk container legislation struck down here from the pushcart vendor prohibition upheld in New Orleans v. Dukes. Regardless of the environmental superiority, found by the majority, of plastic over paper containers, the legislature is free to use a "stepwise" approach, adopting only a partial solution to the waste problem. The legislature could rationally conclude that allowing the plastic nonrefillables to become entrenched in Minnesota would hinder future efforts to force the dairy industry to utilize more environmentally acceptable containers.

The majority concludes that "further action on the subject of milk containers * * * by the Minnesota Legislature is uncertain, if not highly doubtful," citing as evidence the fact that an earlier version of the bill had contained a provision banning paper nonrefillables as well, which provision was eventually removed. However, it is at least arguable that such evi-

dence leads to precisely the opposite conclusion—the same conclusion which might be drawn from the following statements made by senators at the debates on the nonrefillables bill, transcribed and entered in the trial record as Exhibit J:

> "Senator Spear: '* * * It is true that our alternative now is not a returnable system in terms of milk bottles. Hopefully we are eventually going to be able to move to that kind of a system, but we are never going to move to a returnable system so long as we allow another nonreturnable system with all the investment and all of the vested interest that is going to involve to begin.'" Full Senate Floor Discussion, 70th Legislature, May 20, 1977.
>
> "Senator Luther: '* * * the real direction that we should be headed in the state of Minnesota in terms of packaging, is a returnable system. * * * There will be arguments made here today about how the paperboard container is comparable to the throwaway plastic. That is not the issue that is before us. The issue before us is whether we should go into another throwaway plastic system that will be very, very difficult to convert from.'" Full Senate Floor Discussion, 70th Legislature, May 20, 1977.

The U.S. Supreme Court has frequently observed that a step-by-step approach in economic regulation is permissible, see, e.g., New Orleans v. Dukes, *supra*; Katzenbach v. Morgan, 384 U.S. 641, 86 S.Ct. 1717, 16 L.ed 2d 828 (1966), and cases cited therein, and has never required actual evidence that a legislature intends to take a further step in the near future in the relevant economic area being regulated. Here, however, it is at least fair to conclude from the legislative history that the Minnesota legislature indeed intended that the bill banning plastic nonrefillables would be a "first step" in the environ-

mental effort. The U.S. Supreme Court's cautions are well taken here; it is not for this court "to judge the wisdom or desirability of legislative determinations" in this area of economic regulation.

The majority opinion, in its discussion of the Ontario experience with a ban on all nonrefillable milk containers, suggests that such a total ban was actually detrimental to environmental efforts, pointing to evidence that the market share of refillables has dropped since the ban was enacted. Trial evidence established, however, that the plastic pouch is clearly superior from an environmental standpoint to both plastic and paper nonrefillables. Thus, while the measure perhaps did not have precisely the effect intended, it nevertheless had salutary environmental impact. To suggest that such a total ban would not benefit the environment is not only contrary to the evidence; it undermines any attempts on the part of the legislature to proceed with "complete elimination of the evil," an effort of which the plastic nonrefillables was but the first step.

Because I believe that Chapter 268, here declared unconstitutional, was precisely the type of regulation which the U.S. Supreme Court sanctioned in New Orleans v. Dukes, I respectfully dissent from this court's holding that this measure denies equal protection. Having found that Chapter 268 withstands the equal protection challenge, I would further hold that it is not in violation of the commerce clause, Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429, 440, 98 S.Ct. 787, 793, 54 L.ed 2d 664, 674 (1978), or the due process clause, Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124-125, 98 S.Ct. 2207, 2213, 57 L.ed 2d 91, 99 (1978); Federal Distillers, Inc. v. State, 304 Minn. 28, 38, 229 N.W. 2d 144, 154 (1975), but is a constitutional exercise of legislative powers.

STATE OF MINNESOTA
IN SUPREME COURT
(Title Omitted in Printing)

NOTICE OF MOTION AND MOTION FOR EXTENSION OF TIME TO PETITION FOR REHEARING

To: Clover Leaf Creamery Company, et al Respondents and their attorneys, Leonard J. Keyes, Esq. and Douglas L. Skor, Esq., 2200 First National Bank Building, St. Paul, Minnesota 55101.

Please take notice that the Appellant, State of Minnesota, hereby moves for an order of the Court granting Appellant an extension of time until October 5, 1979 to serve and file any petition for rehearing in the above entitled matter the decision of which was filed on September 7, 1979. This motion is made pursuant to Rules 126, 127 and 140, Rules of Civil Appellate Procedure.

The reason for this motion is to enable the Appellant carefully to assess the decision in this case together with that in Can Manufacturers Institute, Inc., et al. v. State, et al. No. 371, filed therewith, to consider the need to file a petition for rehearing and properly to prepare a petition which clearly advises the Court of controlling legal principles, material facts and material questions which the Court has, in Appellant's opinion, failed to consider, misapplied or misconceived.

It is Appellant's understanding that Respondents have no objection to the granting of this motion.

Dated: September 13, 1979.

Respectfully submitted,
WARREN SPANNAUS
Attorney General
By BYRON E. STARNS
Chief Deputy
Attorney General
and KENNETH E.
RASCHKE, JR.
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102 State Capitol
St. Paul, MN 55155
Telephone: (612) 296-6196
Attorneys for Appellant

(Affidavit of Service Omitted in Printing)

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STATE OF MINNESOTA
IN SUPREME COURT
(Title Omitted in Printing)
REFEREE'S FINDINGS AND RECOMMENDATIONS AND ORDER

The above entitled matter came on for hearing before the undersigned as Referee upon motion made pursuant to the provisions of Rule 127, Rules of Civil Appellate Procedure, by Byron E. Starns and Kenneth E. Raschke, Jr., attorneys for appellant for an extension of time for service and filing of a petition for rehearing and

Good cause having been shown, it is recommended that the time for the service and filing of a petition for rehearing be extended to include October 5, 1979.

Dated: September 18, 1979

Referee

IT IS HEREBY ORDERED that the time for the service and filing of a petition for rehearing be extended to include October 5, 1979.

Dated: September 18, 1979

By the Court:

Associate Justice

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(The Petition of the Defendant-Appellant for Rehearing, filed Oct. 5, 1979, is omitted in printing because, pursuant to Rule 140 of the Minnesota Rules of Civil Appellate Procedure, such a petition is in substance a brief or memorandum of law. The affidavit of service of the petition is similarly omitted in printing.)

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STATE OF MINNESOTA
OFFICE OF CLERK OF SUPREME COURT

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ST. PAUL, MINN.
October 31, 1979

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CLOVER LEAF CREAMERY COMPANY, et al,
Respondents,

vs.

STATE OF MINNESOTA,
Appellant.

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SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

ORDERED, that the petition for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,
JOHN McCARTHY
Clerk Supreme Court

STATE OF MINNESOTA, SUPREME COURT

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CLOVER LEAF CREAMERY COMPANY, PHILLIPS PETROLEUM COMPANY, MARIGOLD FOODS, INC., UNILOY DIVISION OF HOOVER UNIVERSAL, INC., WEBER & BARLOW STORES, INC., THE SOCIETY OF THE PLASTIC INDUSTRY, INC., WELLS DAIRY, INC., AND M-H PACKAGING SYSTEMS, INC.,

Respondents,

vs.

STATE OF MINNESOTA,

Appellant.

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Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Ramsey be and the same hereby is in all things affirmed.

Dated and Signed October 31, 1979

By the Court:

Attest:

JOHN McCARTHY

Clerk

(Clerk's certification omitted in Printing)